IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.2456 OF 1983

Mukund Limited
an existing company under the
Companies Act 1913 having their
registered office at
Lal Bahadur Shastri Marg, Kurla,
Bombay-400 070. ... Plaintiffs

V/s

The Minerals & Metals Trading
Corporation of India Ltd.,
having its office at Maker
Bhavan No.2,
19,Sir Vithaldas Thackersey Marg,
Post Box No.11136, Bombay-400020. ... Defendants

Mr.Hiren Mehta i/b DSK Legal for plaintiffs

Mr. D.R. Talegaonkar i/b Bhaishanker Kanga & Girdharlal for defendants.

Coram : A.S. Aguiar,J.

Date : 21st February,2005.

ORAL JUDGMENT

1 The above suit is filed by plaintiffs for the recovery of a sum of Rs.1,47,906/- being the difference in the price paid by plaintiffs to defendants on account of short supply of goods by defendants to plaintiffs. The plaintiffs also claims interest at the rate of 21% per annum on the said sum of Rs.1,47,906/- making a total claim of Rs.2,41,001.68.

2 It is the case of plaintiffs that pursuant to notification issued by the Government on 19/04/1980 under Trade Notice No.MMTC/NF/1/80 reproduced by Association of Indian Engineering Industry in their circular dated May 2nd, 1980 defendants invited applications from eligible actual users for sale of imported Zinc, Lead, Tin and Nickel. The plaintiffs by its letter dated 16/05/1980 applied for 150 Metric Tonnes of Nickel as per the requirement of the Trade Notice and Circular. The plaintiffs annexed demand draft No.AK.781247 dated 0707/ 1980 for Rs.50,000/- by its letter dated 22/07/1980 being the earnest money as required by circular dated 19/04/1980.

3 The defendant by its letter dated 30/07/1980

informed plaintiffs that its application was registered for 125 metric tonnes of Nickel Briquettes/Squares which included a balance of 10 metric tonnes to be allotted to plaintiffs against its earlier application dated 29/07/1980 being registration No.HO:DGTD:NF:DA-461/80. The defendants annexed a sale note dated 04.11.1980 along with their letter and inter alia mentioned therein that sale note covered the part quantity of the material. Pursuant to the said letter and sale note, the plaintiffs annexed a demand draft dated 25.11.1980 for Rs.12,82,659/- towards the full price of 15 metric tonnes of Nickel by its letter dated 26.11.1980. On receipt of the same, defendant issued its delivery order being No.NI/809/80 dated 28/11/1980 in favour of plaintiffs to enable plaintiff to lift 115 metric tonnes of Nickel from defendants godown No.TWZ at Ram Mandir, Cotton Green, Bombay. The plaintiffs by its letter dated 29/11/1980 addressed to defendants' godown-keeper requested him to allow plaintiffs' representative to lift 115 metric tonnes of Nickel against the said delivery order. The plaintiffs' representative M/s Dalal Brothers were allowed to lift three cases of Nickel being Lot Nos. 754,755 and 734
aggregating of 890 Kgs. (net).

4 It is the case of plaintiffs that its representative lifted the material in three cases which were in sealed condition on the representation of defendants that the said three cases contained quantities of goods as stated by defendant in its delivery order and that the plaintiff did not verify the weight of three cases before taking delivery as there was no weighing machine available with defendants.

5 However, when the goods were weighed in the office of plaintiffs, it was found that there was short supply of 1654 Kgs. There were only 8540 Kgs.instead of 10194 Kgs. as indicated on the said three cases and certified by defendants. Hence, plaintiff by its telex message dated 8/9-12-1980 informed the sales officer of defendants about the short supply and called upon him to make good the said 1654 Kgs. of Nickel. The defendant by their letter dated 14/81/1981 for the first time informed plaintiffs that they were investigating the matter.However, defendants despite several reminders failed to make good the short supply and/or refund the value of the short supply of Nickel.Hence, the learned advocate for plaintiffs issued legal notice dated 12/09/1983 to defendant and filed the present suit.

5 The defendants have filed their written statement dated 19/08/1987 pointing out that plaintiffs have not annexed the sale note to the plaint. The sale note contains the following clause.

> "No claim will be entertained by seller for any alleged shortages in the quantity supplied on the basis of weight recorded elsewhere. The responsibility of seller ceases in all respects once the material has been despatched or delivered ex-godown".

The learned advocate for defendants has further drawn my attention to clause6(II) of the sale contract which provides that the defendants would not entertain any claim of any nature whatsoever from buyers in respect of material covered by the sale note once it was delivered/despatched.

6 It is the contention of defendants that it was incumbent upon petitioners to have caused the said cases of Nickel to be weighed at the time of taking delivery. It is their contention that Nickel boxes in question had been imported and duly packed in drums/containers which had been marked by foreign supplier. It was always open to plaintiffs to have counter-checked the gross weight at the

time of taking delivery by having the said boxes loaded on to the trucks and getting the same weighed at weigh bridge. It is contended that having taken unconditional delivery of goods, the question of defendants making good the alleged short supply does not arise. The defendants have denied that there was no weighing machine available at their godown and godown keeper intimated to the representative of plaintiffs that weighing machine was not available. They have also denied that defendants' representative assured plaintiffs' representative that the three cases contained the correct weight as per overseas supplier or that it was not necessary to weigh the said three cases. The defendants deny that there was in fact any short supply as alleged.

7 On the basis of said pleadings, issues were framed by this court on 12/9/2003. The same are as follows:

Issues

1.Whether the Plaintiffs prove that the suit claim is maintainable in view of provisions in the Sale Note annexed to the plaint dated 1.4.1980 and Clause 6(ii) of the Sale Contract ?

2.Whether the Plaintiffs prove tat there was short supply

in the delivery of Nickel by the Defendants to the Plaintiffs to the extent of 1689 Kgs. As mentioned in paragraph 16 of the Plaint ?

3.What orders ?

8 In support of their case, plaintiffs have examined one Vimlesh V. Shah. Whereas defendants have examined one Vithal Damodar Yadav in order to explain the procedure adopted by plaintiffs for giving delivery of goods purchased from them.The said Vithal Yadav admits he has no personal knowledge of the suit proceeding and that he is only aware of procedure for delivery as of now. Referring to the documents at page-13 and 14 of compilation of documents. D.W.1 has narrated the procedure adopted for delivery of the goods to the plaintif. According to him, the goods were initially collected from Central Warehousing Corporation and taken to MMTC godown where the goods were weighed. This is reflected in document at page-13. According to defendants, the document at page-14 confirms the contents of documents at page-13. It is contended by the defendant that plaintiffs are confusing the issue by referring to and alleged report of Sub Inspector of Police at Rabale Police Station Thane stating that the Sub-Inspector carried out weightment of the said

three cases and on that basis he has pointed out that there was shortage in weight of Nickel delivered to plaintiffs.However the plaintiffs have not brought on record the investigation report filed by the Rabale Police Station.

9 Basically, it is the case of the plaintiffs that when the three cases were weighed at the plaintiffs' office short supply of 1654 Kgs. Of Nickel was detected and immediately by telex message plaintiffs informed defendants of the short supply of Nickel.According to the plaintiffs their representative took the delivery of goods from defendants godown on 6/12/1980. According to plaintiffs, their representative could not verify the correctness of quantity of the goods i.e. Nickel, as there was no weighing machine available at defendants godown.The defendants refer to the evidence of witness Vithal Yadav stating that the material was taken by the transporters of plaintiffs along with MMTC representative one Mr.Kharkhanis to D.Abraham godown at Ray Road which godown was exclusively taken on rent by MMTC for themselves and weighment was made in the said godown at the weighbridge. The party was fully satisfied about proper weight of goods and in token thereof signed at the right hand side of the document after which

they took away the material. The MMTC's representative had accompanied the lorry for the purpose of weighment from Central Warehousing Corporation godown to Dr.Abraham godown. The signature at the foot of the delivery challan in the centre is that of the representative Mr.Kharkhanis who is the same person who has signed the gate pass on behalf of MMTC.From a perusal of the saod documents it is clear that defendants have taken final delivery not at Central Warehousing Corporation godown at Elphinstone Road.Since the plaintiffs representative insisted on weighment, the goods were taken to David Abraham godown which was in exclusive possession of defendants and in that godown the weighment was made on the weighbridge. On being satisfied of the correct weight delivery was taken by plaintiffs.

10 It is the case of plaintiffs that plaintiffs had insisted upon weighing the boxes before taking the delivery of goods but the same was denied by defendants as there was no weighing machine available with defendants godown.This fact, according to plaintiffs is seen from the defence witness evidence wherein he has stated as follows.

"On the basis of Exhibit P-10 it is clear that consignment of metal was weighed before taking the

delivery. I do not know the name of supplier, we weigh of assignment before taking the delivery,only when there is doubt as to quantity supplied. The doubt arise whenever it has found that seal on boxes has been tampered. There was no weighbridge at the place from where took the delivery of consignment". In substance it is the plaintiffs contention that consignments were not weighed at the time of delivery although plaintiffs insisted upon getting the consignments weighed.

11 Whether plaintiffs insisted on getting the consignments weighed before taking the delivery or not is a matter of conjecture. However,the fact remains that plaintiffs took the delivery of goods on 6/12/1980 as is confirmed from the delivery challan which is dated 6/12/1980. The plaintiffs have admitted that three boxes were in sealed condition. There is nothing on record to show that seals were tampered with so as to raise any suspicious requiring the goods to be weighed before taking delivery. It is only reasonable to presume that finding the seals in good condition , plaintiffs accepted the delivery of goods from the godown of defendants. Even if plaintiffs suspected or wanted to confirm that the boxes contained the correct quantity mentioned on the boxes,

nothing prevented plaintiffs from getting the said consignment weighed at the nearest weighbridge. Before accepting the delivery, the plaintiffs could have got the consignments loaded on their lorries/trucks and takenb to the nearest weighbridge where the net weight of the consignments could have been ascertained.There is nothing on record to show that plaintiffs suspected the boxes did not contain the exact quantity as stated. Therefore, there is no reason for the plaintiff to have insisted on getting the consignments weighed before taking delivery.In fact the representative of the plaintiffs took the delivery of goods from the defendant's godown on 6/12/1980 and goods were delivered to plaintiffs factory premises on 8/9-12-1980 when the alleged short fall in the supply of Nickel was noticed the plaintiffs thereafter sent telex message to defendants calling upon them to make good the short supply.It is not understood why the consignment which was collected by the agent of plaintiffs on 6/12/1980 was not delivered to plaintiffs factory premises on the same date. Admittedly, there was a delay of 3 days in plaintiffs receiving the goods at their factory premises after being collected from the defendants godown.It clearly left enough time for any third person, including the agent of plaintiffs, to have tampered with the cases and taken away

part of the consignments resulting in short fall in the quantity of Zinc,Lead, Tin and Nickel Metal. It has come in the evidence of defendants witness that the consignment is weighed before taking the delivery only when there is some doubt as to quantity of supply when the seal is found to be tampered with. Thus, it would not be unreasonable to accept that the plaintiffs' representative did not insist on getting the consignments weighed before taking delivery . Since the seals on the cases did not appeare to have been tampered with.

12 'Caveat Emptor'- buyer beware" is a well known maxim which envisages that the purchaser before taking the delivery of the goods must satisfy himself as to the genuiness of the goods including the correctness of the quantity of goods. Before taking the delivery , it is incumbent upon the purchaser, as prudent person to ascertain the genuiness of the goods purchased.Once having taken the delivery of goods, he does so at his own risk. This well known principle is incorporated in the defendants Sale Note which provides that no claim will be entertained by the seller for any alleged shortage in the quantity supplied on the basis of weight recorded elsewhere and that responsibility of the seller ceases in all respects

once the material has been despatched or delivered ex-godown. Clause 6 of the Sale Contract also stipulates that defendants would not entertain any claim of any nature whatsoever from the buyers in respect of all material covered by Sale Note, once it was delivered/despatched. It was therefore, incumbent upon plaintiffs to have checked the consignment and to have satisfied themselves of the correct weight before taking delivery of the goods. If there was no weighing machine at the godown of defendants, plaintiffs could have insisted that defendants' agent accompany them to the nearest weighbridge for weighing consignments. Nothing of this sort has been done in the present case. The plaintiffs' representative/agent delivered the consignment at the plaintiffs factory premises only 3 days after collecting the consignment from the defendants godown. The delay of 3 days raises doubts about the the consignment having been delivered intact to the plaintiffs factory and is therefore, fatal to the plaintiffs claim for the short supply.

The plaintiffs have failed to make out any case for the reliefs as prayed. Hence, suit dismissed. No order as to costs.

(A.S. Aguiar,J.)